

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELIJAH TILLMAN, JR.,

Defendant-Appellant.

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UNPUBLISHED

June 28, 2005

No. 254625

Saginaw Circuit Court

LC No. 02-021839-FC

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions for felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and resisting and obstructing a police officer, MCL 750.479. The trial court granted defendant's motion for directed verdict at the close of the prosecutor's case on the counts of conspiracy to commit first-degree premeditated murder, MCL 750.157a and MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.85, and felony-firearm relating to either the murder or assault charge. The jury acquitted defendant of attempting to disarm a police officer, MCL 750.92 and MCL 750.4796(2). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of three to ten years for the possession of a firearm conviction and two to four years for the resisting arrest conviction. Defendant also was sentenced to a consecutive two years' imprisonment for the felony-firearm conviction. We affirm, but remand to the trial court for correction of defendant's presentence investigation report (PSIR).

Defendant first argues that there was insufficient evidence presented at trial to support his convictions. We disagree. In reviewing a sufficiency of the evidence claim, we determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). This standard of review is deferential to the trial court and this Court is to draw inferences and make credibility determinations in favor of the jury verdict. *Id.* at 400.

Defendant argues that there was insufficient evidence of possession to support his felon in possession of a firearm and felony-firearm convictions. We disagree. To prove possession, the prosecutor must present evidence of actual or constructive possession. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). In this case, a gun was found on the floorboard of the front passenger seat of the vehicle, near where defendant was sitting. There

was also evidence that during a struggle with police, defendant tried to crawl toward the car and reach for something inside. The gun was later discovered within six inches of where defendant had been reaching. This evidence could lead a reasonable juror to find that defendant knew where the gun was in the vehicle and that the gun was easily accessible to him. See *id.* at 438. This is sufficient to show constructive possession and therefore was sufficient to support defendant's firearm convictions.

Defendant also argues that there was insufficient evidence to support his conviction for resisting arrest because the prosecutor did not show that his arrest was lawful. See MCL 750.479; *People v MacLeod*, 254 Mich App 222, 226; 656 NW2d 844 (2002). We disagree. If an arrest is unlawful, a person may use reasonable force to resist the arrest. *Id.* at 226-227. "A defendant's restraint is not necessarily an arrest." *People v Green*, 260 Mich App 392, 397; 677 NW2d 363 (2004).

Here, when the police began following the vehicle that defendant was a passenger in, the police only believed that they were investigating a possible drunk driver. However, when the officer activated the emergency lights, the vehicle did not stop and engaged police in a high-speed chase, involving speeds of more than sixty miles per hour in a residential area. The chase ended when the vehicle was involved in a fairly serious accident. Immediately following the accident, the driver of the vehicle fled the scene and the other occupants attempted to exit the vehicle. Thus, the officer who approached the car had more than enough reasonable suspicion to detain the individuals in the car for an investigatory stop and for his safety. See *People v Estabrooks*, 175 Mich App 532, 535; 438 NW2d 327 (1989). Once the officer approached the vehicle, defendant and another occupant did not obey his command to stay in the vehicle, and defendant became aggressive and struck the officer. The officer also testified at trial that after defendant struck him, there was a point where defendant grabbed the officer's firearm. At this point, the officer had probable cause to arrest defendant for both the assault and for attempting to disarm a police officer.<sup>1</sup> See *Green*, *supra* at 398. Therefore, the prosecutor proved that defendant's arrest was lawful thus this sufficiency challenge is without merit.

Defendant next argues that his trial counsel was ineffective for failing to move to sever the charges relating to the shooting, which took place before the car chase, from the charges relating to the struggle with the police officers. Again, we disagree. Whether defendant was denied effective assistance of counsel is a mixed question of fact and law. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Because a *Ginther*<sup>2</sup> hearing was not held in the trial court, our review is limited to mistakes apparent from the lower court record. *Id.*

Defendant argues that his counsel erred in not motioning for severance under MCR 6.120(C). Specifically, defendant claims that trying all of the charges together allowed the jury to convict based not on the evidence, but on a desire to punish someone for the shooting. MCR 6.120(C) offers a narrow ground for discretionary severance. *People v Abraham*, 256 Mich App

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<sup>1</sup> The fact that defendant was subsequently found not guilty of this crime would not render the arrest unlawful. See *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

265, 272 n 4; 662 NW2d 836 (2003). “While it is correct that a trial court may sever related offenses in certain circumstances, . . . a trial court is not required to do so.” *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). We can see no fault with trial counsel’s decision not to move for severance under the circumstances. There is no indication that the parties were not ready for trial on all of the charges. Additionally, the potential for confusion seems remote given the distinct crimes in issue and the clear instructions provided by the court. MCR 6.120(C). Also, consideration of judicial economy and witness convenience weigh in favor of joining all the charges. See *Duranseau, supra*. Indeed, all of the charges were related because they consisted of “a series of connected acts” that included the shooting. MCR 6.120(B)(2).

Additionally, it may be considered reasonable trial strategy to try all the charges together. If the evidentiary support for the charges relating to the shooting was as weak as defendant contends (a contention supported by the directed verdicts of acquittal on all three), then counsel could have reasonably theorized that trial of all charges together would give defendant a greater chance of acquittal on the remaining three counts. In any event, we will not evaluate counsel’s competence with the benefit of hindsight. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). We therefore conclude that defendant cannot show that defense counsel’s “representation fell below an objective standard of reasonableness,” *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984), or that if the motion was filed, the result of the proceedings would have been any different, *id.* at 694.

We also reject defendant’s argument that the prosecutor improperly appealed to the jury’s sympathy for the victim of the shooting during closing arguments. Reviewing the prosecutor’s remarks in context, *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995), we disagree. Defendant’s theory was that while he was present in the car, he had no knowledge either of the presence of guns in the car or of the shooting. The prosecutor made the remarks relating to the shooting to suggest that defendant had to have knowledge of the weapons in the vehicle and that each of the men in the car were armed. The prosecutor was arguing that the circumstances of the shooting, including the police chase and resulting arrest, should be viewed as one event by the jury, and that when done so, it supported the prosecution’s assertion that defendant was in possession of a firearm. This was proper commentary on the evidence. In any event, even if the comments were improper, any prejudice to defendant was alleviated with an instruction from the trial court that the attorney’s statements were not evidence. See *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Defendant next argues that the trial court erred when it denied his motion for a new trial premised on the ground that evidence was improperly excluded. We disagree. We review a trial court’s decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Defendant argued in his motion for a new trial that the responding officer’s personnel record was erroneously excluded from evidence and that new evidence existed that the officer was involved in an assaultive dispute after the trial occurred. The trial court found this evidence to be inadmissible under MRE 404(b) because the evidence was being offered for no other reason except to show that officer’s propensity towards aggressive actions while on duty. We agree with the trial court that the evidence of other acts was inadmissible. Defendant argues that it was being offered to prove intent, knowledge, or lack

of mistake but does not explain how the evidence would relate to any of those permissible uses. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant next argues that his convictions of both felon in possession of a firearm and felony-firearm violate his double jeopardy rights. However, our Supreme Court has already determined that convictions for both felon in possession of a firearm and felony-firearm do not violate double jeopardy protections. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Therefore, defendant's claim is without merit.

Defendant next argues that the trial court erred in scoring offense variables (OV) one and three at twenty-five points each because the charges related to the shooting of the victim were dismissed by directed verdict. Upon de novo review of the trial court's application of the sentencing guidelines, we disagree. See *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

Sentencing guideline scoring decisions are discretionary and need not be consistent with the jury verdict. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000); *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993). Facts underlying an offense of which a defendant was acquitted may be considered and the points scored will be upheld if adequately supported by the record evidence. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); *People v Granderson*, 212 Mich App 673, 679; 538 NW2d 471 (1995). Here, the record evidence supports the sentencing court's scoring decisions as to OV 1 and 3, including that defendant was with his codefendants when the victim was shot multiple times causing the victim to sustain life-threatening injuries. See MCL 777.31(1)(a) and (2)(b); 777.33(1)(c) and (2)(a).

Next, defendant argues that the trial court improperly permitted the prosecutor to amend the information allowing sentencing as a third-offense habitual offender. After review of the decision to amend the information for an abuse of discretion, we disagree. See *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003).

An information may be amended before, during, or after trial to cure a defect, imperfection, or omission as long as the defendant is not prejudiced by the amendment. MCL 767.76; MCR 6.112(H). Unacceptable prejudice includes unfair surprise, inadequate notice, or inadequate opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). The information originally filed in this case, and on which defendant was arraigned, noted defendant's third-offense habitual offender status but included an incorrect underlying conviction. The prosecutor moved to amend the information to remedy the mistake with the correct underlying conviction. For some reason the prosecution failed to file the amendment and, after the trial but before sentencing, defendant moved to reduce the habitual offender status to a second-offense because of the delay. The trial court granted defendant's motion but on the day of sentencing, about two months later, the court granted the prosecution's motion to amend the information and permit sentencing as a third-offense habitual offender. Defendant does not claim prejudice but insufficient notice of the intent to enhance his sentence. Defendant's argument is without merit. He was arraigned with notice of his third-offense habitual offender status. That status was uncontested until after the trial and only on grounds of a technicality that did not challenge the underlying convictions, which he was advised of at his preliminary

examination. Thus, the trial court did not abuse its discretion in permitting amendment and sentencing defendant as a third-offense habitual offender. See *Hornsby*, supra at 472.

Next, defendant argues that his sentence violated his Sixth Amendment right to a jury trial and the holding in *Blakely v Washington*, 542 US \_\_\_\_; 124 S Ct 2531, 2536; 159 L Ed 2d 403 (2004). However, our Supreme Court in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), held that *Blakely* does not affect Michigan's sentencing scheme and we are bound by that decision.

Finally, defendant argues that the PSIR forwarded to the Department of Corrections was not accurate. We agree. At sentencing, the trial court indicated that certain information contained in the report was not relevant and was not considered in determining defendant's sentence. However, none of the information was actually removed from the report. Defendant is entitled to have an accurate PSIR forwarded to the DOC. *People v Walton*, 461 Mich 907; 623 NW2d 594 (1999); *People v Norman*, 148 Mich App 273, 274-275; 384 NW2d 147 (1986). Therefore, this matter is remanded for the purpose of correcting the PSIR which shall then be forwarded to the DOC.

Affirmed, but remanded to the sentencing court for correction of defendant's PSIR consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens  
/s/ Mark J. Cavanagh  
/s/ Janet T. Neff